

P. 19260

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permitted
Applications 26380 and 27353

ROCK CREEK LIMITED PARTNERSHIP

Permittee.

ORDER: WR 90-10

SOURCE: Rock Creek

COUNTY: El Dorado

ORDER AMENDING PERMITS

BY THE BOARD:

1.0 INTRODUCTION

The Rock Creek Limited Partnership having received Permits 19259 and 19260 to divert water from Rock Creek; the permits having been amended by State Water Resources Control Board (Board) Order 87-2; the U. S. Supreme Court having determined that a state cannot set fish bypass flow requirements which conflict with those set in the FERC license; the Board finds as follows:

2.0 DESCRIPTION OF PROJECT

Joseph M. Keating filed Applications 26380 and 27353 on May 22, 1980 and June 4, 1982, respectively, to appropriate water from Rock Creek. Permits 19259 and 19260 were issued on June 12, 1984, authorizing diversion of water from Rock Creek for the purpose of hydroelectric generation. On December 20, 1985, the permits were assigned to Rock Creek Limited Partnership.

3.0 LITIGATION REGARDING INSTREAM FLOWS FOR PROTECTION OF FISH

On June 12, 1984, permits were issued which contained interim minimum bypass flow requirements identical to the bypass flow requirements in FERC's license. The Board reserved jurisdiction to set permanent minimum bypass flow rates following long-term studies. In July, 1986, permittee petitioned FERC for a declaratory order stating that FERC had exclusive jurisdiction to establish permanent minimum bypass flow rates. In March, 1987, FERC issued a declaratory order in which it held that the State could not establish bypass flow rates that conflict with FERC's. FERC said that the imposition of minimum flow releases was an integral part of its licensing process under section 10(a) of the Federal Power Act (FPA). FERC relied on (First Iowa Hydro-Electric Coop. v. FPC, 328 U. S. 1523 (1946)) for authority to preempt state regulation of flow rates.

The Board held hearings on May 19, 1986 and September 15, 1986 to review fish bypass flow requirements at the request of the Department of Fish and Game. On March 19, 1987, the Board issued Order No. 87-2, amending the permits to increase the minimum flow rates to permanent levels of 30 cubic-feet per second (cfs) from July 1 through February 29 and 60 cfs from March 1 through June 30.

In response to FERC's declaratory order, the State of California filed with FERC a motion for intervention on behalf of the Board and requested a rehearing of the declaratory order. FERC granted the intervention motion but denied the rehearing request.

In December, 1987, California filed a petition with the United States Court of Appeals for the Ninth Circuit requesting a review of the FERC declaratory order. The Ninth Circuit, State of California, ex rel State Water Resources Control Board v. Federal Energy Regulatory Commission, No. 89-333, affirmed FERC's order. California filed a petition for certiorari with the U. S. Supreme Court. On December 4, 1989, the U. S. Supreme Court granted the State of California's petition for a writ of certiorari in the case of State of California v. Federal Energy Regulatory Commission, No. 89-333. On May 21, 1990, the U. S. Supreme Court affirmed the Ninth Circuit's decision.

4.0 CONCLUSION

The U. S. Supreme Court has ruled that the State cannot set fish bypass flows which conflict with those set by the FERC license.

FERC has set interim minimum flow rates of 11 cfs from May 1 through September 30 and 15 cfs from October 1 through April 30. The permits should be amended to reflect these flow rates. Term 17 by which the Board reserved jurisdiction over bypass flows should be amended to retain continuing authority to revise the bypass flows in the event Federal statutes or the flows specified in the FERC license are changed.

ORDER

IT IS HEREBY ORDERED that water right Permits 19259 and 19260 shall be amended as follows:

1. Term 16 in both permits is amended to read:

"For the protection of fish, wildlife and riparian vegetation, permittee shall bypass from May 1 through September 30, a minimum of 11 cfs and from October 1 through April 30, a minimum of 15 cfs. The total streamflow shall be bypassed whenever it is less than the amount designated."

"No water shall be diverted under this permit unless a device, satisfactory to the State Water Resources Control Board, is installed and is operating which is capable of measuring this bypass flow."

2. Term 17 in both permits is amended to read:

"The State Water Resources Control Board retains continuing authority over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek. This authority may be exercised if, in the Board's discretion, an amendment is needed either to conform the bypass flow requirement to future amendments in the FERC license or, if federal statutes are revised to provide more authority to the states, to establish such bypass flows as the Board may find are appropriate under

all the circumstances. Any action under this term will be preceded by notice to interested parties and opportunity for hearing if the change is not made necessary by law."

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 19, 1990.

AYE: W. Don Maughan
 Darlene E. Ruiz
 Eliseo M. Samaniego
 John Caffrey

NO: None

ABSENT: Edwin H. Finster

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ORDER

APPLICATION 27353

PERMIT 19260

LICENSE _____

ORDER AMENDING PERMIT TERMS 16 AND 17
PURSUANT TO BOARD ORDER WR 87-2 AND
UPDATING PARAGRAPH 9

WHEREAS:

1. Permit 19260 was issued to Joseph Martin Keating on June 12, 1984 and is currently held by Rock Creek Limited Partnership.
2. A Board hearing was held on May 19, 1986 and September 15, 1986 to review fish bypass flow requirements in Permit 19259 at the request of the Department of Fish and Game. The Board issued Order No. 87-2 on March 19, 1987 revising Permit terms 16 and 17.
3. Permit Paragraph 12 pertaining to the continuing authority of the Board needs to be updated to conform to standard permit term 12 as contained in Title 23, California Administrative Code Section 780(a).

NOW, THEREFORE, IT IS ORDERED THAT:

1. Permit Paragraph 16 is amended to read to follows:

"For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:

- a. From July 1 through February 29, a minimum of 30 cubic feet per second;
- b. From March 1 through June 30, a minimum of 60 cubic feet per second;
- c. The total streamflow shall be bypassed whenever it is less than the amount designated for that period.

"No water shall be diverted under this permit unless a device, satisfactory to the State Water Resources Control Board, is installed and is operating which is capable of measuring these bypass flows.

2. Paragraph 17 in this permit is amended to read as follows:

"The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after notice to interested parties and opportunity for hearing."

3. Paragraph 9 of this permit is deleted. A new paragraph 9 is added as follows:

Pursuant to California Water Code Sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

Dated: OCTOBER 05 1987



Raymond Walsh, Chief
Division of Water Rights

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ORDER

19260

APPLICATION 27353

PERMIT

LICENSE

ORDER APPROVING A MODIFICATION IN PERMIT TERM 20

WHEREAS:


1. A petition to modify or delete Permit Term 20 has been filed with the State Water Resources Control Board.
2. The Board has determined that the petitioned changes do not constitute the initiation of a new right nor operate to the injury of any other lawful user of water.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Paragraph 20 of the permit is modified to read as follows:

Permittee shall undertake static tests to determine seepage rates from the tunnel. These tests shall be made in accordance with procedures approved in writing by the Chief of the Division of Water Rights. An initial test shall be made prior to diversion of any water and additional tests may be required at the discretion of the Chief of the Division of Water Rights. If in the opinion of the Chief of the Division of Water Rights, the tests indicate that daily losses exceeding 8% are reasonably possible, the permittee shall take whatever steps are necessary to reduce the loss to 8% or less. Failure of the permittee to achieve that level of loss within two years after loss in excess of eight percent is first predicted by static tests shall constitute a violation of this permit term.

Dated: MAY 15 1986


Lloyd Johnson, Interim Chief
Division of Water Rights

PERMIT FOR DIVERSION AND USE OF WATER

P19260

12-20-85 Add to Rock Creek, Limited Partnership

5. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 140 cubic feet per second by direct diversion from Rock Creek, to be diverted from October 1 through May 31 of each year.

The equivalent of the continuous flow allowance for any 14-day period may be diverted in a shorter time, provided there be no interference with other rights.

6. The amount authorized for appropriation may be reduced in the license if investigation warrants.

7. Progress reports shall be submitted promptly by permittee when requested by the State Water Resources Control Board until license is issued.

8. Permittee shall allow representatives of the State Water Resources Control Board and other parties as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

9. Pursuant to California Water Code Sections 100 and 275, and the public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses, prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) to installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action takes into account the public interest and is necessary to protect public trust uses. All such actions shall conform to the standard of reasonableness contained in Article X, Section 2 of the California Constitution.

10. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Resources Control Board if, after notice to the permittee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

11. Water diverted under this permit is for nonconsumptive uses and is to be released to Rock Creek at its confluence with the South Fork American River within the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 20, T11N, R11E, MDB&M.

12. Permittee shall obtain full project financing and commence construction of the project within two years after the date of this permit and shall thereafter prosecute the project with reasonable diligence. In no event shall permittee commence construction in Rock Creek or divert any water from Rock Creek unless it has financing to completely construct the project.

13. Project construction work shall be completed by December 1 of the fourth year after the date of this permit.

14. Permit shall make complete application of the water to the authorized use by December 1, 1995.

15. All rights and privileges to appropriate water for power purposes under this permit and any subsequently issued license are subject to depletions resulting from future upstream appropriation for domestic and stockwatering uses within the watershed. Such rights and privileges may also be subject to future upstream appropriations for uses within the watershed other than domestic and stockwatering if and to the extent that the Board determines, pursuant to Water Code 100 and 275, that the continued exercise of the appropriation for power purposes is unreasonable in light of such proposed uses. Any such determination shall be made only after notice to permittee or licensee of an application for any such future upstream appropriation and the opportunity to be heard; provided that a hearing, if requested, may be consolidated with the hearing on such applications. (0160800)

16. For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:

a. From October 1 through April 30, a minimum of 15 cubic feet per second;

b. From May 1 through September 30, a minimum of 11 cubic feet per second;

The total streamflow shall be bypassed whenever it is less than the amount designated for that period.

No water shall be diverted under this permit until permittee has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring these bypass flows.

17. a. Permittee, in consultation and cooperation with the Department of Fish and Game, shall conduct an Instream Flow Incremental Methodology IFG-4 flow study within the reach of Rock Creek from 550 feet upstream of the diversion dam downstream to the point of return of water from the proposed powerhouse at the confluence of Rock Creek with South Fork American River. The study shall evaluate the effects of flow levels on trout life history stages and on habitat needed to support the different life stages.

The study shall model all representative habitats of the affected reach of Rock Creek including the habitats not previously modeled by the permittee's contractor. (These include the spawning habitat, the low gradient riffle habitat in the upper part of the affected reach, and the side channel of the stream segment previously modeled by the permittee's contractor.) To the extent possible, and with the agreement of the Department of Fish and Game, the permittee may use the original IFG-4 study to supplement the new study.

b. All field work elements of the study described in a. shall be completed prior to commencement of any construction work in the channel and overflow areas of Rock Creek within the reach described in a. No diversion of water shall be made from Rock Creek until the study described in a. is completed and the results evaluated.

c. The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after evaluating the results of the study described in a. and after notice to interested parties and opportunity for hearing.

18. In accordance with Section 1601, Section 1603 and/or Section 6100 of the Fish and Game Code, no work shall be started on the diversion works and no water shall be diverted until permittee has entered into a stream or lake alteration agreement with the Department of Fish and Game and/or the Department has determined that measures to protect fishlife have been incorporated into the plans for construction of such diversion works. Construction, operation, and maintenance costs of any required facility are the responsibility of permittee.

19. No water shall be used under this permit until all necessary federal, state and local approvals have been obtained, including compliance with any applicable Federal Energy Regulatory Commission requirements.

20. a. Measuring devices shall be installed by permittee that are capable of measuring water losses and gains in the closed conduit system from the point of diversion to the point of return.

b. Loss data shall be tabulated for the period October 1 of one year through September 30 of the succeeding year in daily increments and shall be submitted to the State Water Resources Control Board by October 15 of each year.

c. If the loss exceeds eight percent of the amount of flow being diverted from Rock Creek, permittee shall take whatever steps are necessary to reduce the loss to eight percent or less. Failure of the permittee to achieve that level of loss within two years after loss in excess of eight percent was first detected shall constitute a violation of this permit term.

21. This permit shall not be construed as conferring upon the permittee right of access to the proposed point of diversion, conveyance facilities or the powerhouse and appurtenant structures.

22. No major construction activities shall occur in the flowing water.

23. Construction activities adjacent to streams and any necessary erosion control measures shall be completed prior to heavy runoff periods.

24. Material from road and other construction work shall not be deposited where it could be eroded and carried to the stream by surface runoff or high stream flows.

25. Where working areas encroach live streams, barriers shall be constructed which are adequate to prevent the flow of turbid water into the stream.

26. During construction, cofferdams shall segregate the zone of construction activity from streamflow. Provisions shall be made to allow streamflow to bypass the construction zone with a temporary diversion conduit.

27. Permittee shall provide an automatic emergency shut off gate(s) or valve(s) capable of discontinuing the flow of water in the event of penstock failure or to dewater the penstock for maintenance purposes.

28. All construction activities required to build the dam, tailrace, and tunnel intake portal shall be scheduled during low flow periods.

29. Provisions shall be made to prevent spillage or disposal of oils, fuels, or associated containers in the construction zone. Disposal shall only be at approved locations.

30. To minimize the opportunity for contamination of the environment from machinery lubricants, and coolants, all electrical generation equipment shall be contained inside a structure.

31. All access roads shall be provided with drainage control measures to prevent erosion of road surfaces.

32. Exposed and unstable soils shall be stabilized by physical means until the soil can be successfully revegetated.

33. A fire protection plan shall be developed between the applicant and the Bureau of Land Management prior to project construction. Among the items to be considered are transmission line safety and protection, a fire hydrant valve on the penstock, and other fire prevention criteria that may be incorporated into the design, construction, and operation of the project.

34. An activities and restoration plan shall be developed, in consultation with the U. S. Bureau of Land Management, to ensure that construction work is accomplished with minimum damage and that appropriate rehabilitation is performed.

35. An acceptable land fill location shall be determined in cooperation with the U. S. Bureau of Land Management and El Dorado County for disposal of dredged or excavated spoil material.

36. Facilities shall be colored where applicable to blend the facilities into the natural setting. This shall be coordinated with the U. S. Bureau of Land Management.

37. For purposes of recreational mitigation, permittee shall;

(a) provide for picnicking around the powerhouse area with two picnic tables with designated fire rings. Season of use shall be designated on a posted warning to prevent use during critically dry periods.

(b) provide parking for eight vehicles on the access road before any gate structure.

(c) not restrict foot traffic below the proposed diversion structure.

This term shall not be construed to prevent implementation of security measures to protect the project facilities.

38. A qualified archeologist shall be present during excavations at the tunnel exit, trifurcation section, new penstock location (if a new penstock is proposed) and outside the limits of the existing powerhouse location and tailrace. If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works or other facilities at the project, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Permittee shall consult with the State Historic Preservation Office (SHPO) to develop a mitigation plan for the protection of significant archeological or historical resources.

39. Permittee shall install a fish screen of a type and in the location that is acceptable to the Department of Fish and Game.

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Dated: JUNE 12 1984

STATE WATER RESOURCES CONTROL BOARD

Raymond Wash

Chief, Division of Water Rights